



CASE CLIPS

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CRIMINAL LAW ISSUES

GRIFFIN v. STATE, No. 49S02-0101-CR-43, ___ N.E.2d ___ (Ind. Sept. 7, 2001).
SHEPARD, C. J.

James Griffin asks for a new trial on his carjacking charges because an alternate juror improperly expressed her belief in his guilt during his jury's deliberations. . . .

....

Griffin asserts, based on juror affidavits submitted with his motion to correct error, that several jurors then sought to break the deadlock by asking the alternate her opinion on Griffin's guilt. This violated the judge's specific instruction prohibiting the alternate's participation in deliberations. [Footnote omitted.] The alternate answered that she thought Griffin was guilty because the victim's identification was reliable based on his twenty-minute conversation with the carjacker.

One juror stated in her affidavit that the alternate's input "affected my vote." [Citation to Record omitted.]

....

A threshold question is whether the juror affidavits may be considered at all. Indiana Evidence Rule 606(b), adopted in 1994, says:

Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any

outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

Griffin argues that the alternate's opinion was an "outside influence" under the third exception, and we agree. The affidavits are therefore admissible, at least as evidence . . . that the alternate improperly participated in jury deliberations. . . .

....

. . . As the Seventh Circuit has explained:

In evaluating a claim that the jury was improperly influenced by extraneous material, "a district court must ignore a juror's comment regarding how a particular piece of material disposed the juror toward a particular verdict, and the district

court must make an independent determination of the likely effect of the prejudicial material.”

[Citations omitted.]

This approach would seem to restrain the potential for a losing party to provoke virtual re-enactments of the deliberation through competing affidavits purporting to describe the thought processes of individual jurors. . . .

Thus, the fact that one juror says the alternate’s input “affected” her decision is not part of the analysis governing the request for a new trial. Rather, the trial court must consider the alternate’s conduct in the overall trial context. The alternate did not add any fresh perspective to the discussion; the other jurors were well aware that the State’s case relied on a strong eyewitness identification. [Footnote omitted.] It is difficult to believe that if eleven other jurors favored conviction, the twelfth only acceded because the alternate also favored conviction when the majority solicited one more view.

Our skepticism takes into account the fact that an alternate is like a regular juror in two important respects: the alternate has been through the same voir dire to safeguard against bias or knowledge of information not in evidence, and has heard exactly the same evidence. . . .

. . . [T]he alternate’s only influence was adding one more “me, too” to the collective voice of the jury majority. Under the facts presented, Griffin has not shown either gross misconduct or probable harm. The trial judge therefore acted within the bounds of his discretion in denying relief based on juror misconduct.

♦ ♦ ♦ ♦

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

LESHORE v. STATE, No. 02S03-0101-CR-69, ___ N.E.2d ___ (Ind. Sept. 13, 2001).

RUCKER, J.

We grant the State’s petition to transfer and hold that where a police officer places a person in handcuffs pursuant to a Writ of Body Attachment, the person is “lawfully detained” within the meaning of the escape statute even though the Writ later proves to be defective.

. . . On March 17, 1999, police officer Michael Bennington went to the Fort Wayne home of James Leshore to execute a Writ of Body Attachment. Leshore had not paid child support and was being cited for contempt of court. The Writ directed Officer Bennington to “attach and keep [Leshore] until you bring [him] before the Judge to answer a charge of contempt in not obeying the order of [the Allen Superior Court].” [Citation to Record omitted.] Officer Bennington entered Leshore’s home, placed Leshore in handcuffs, and detained him. Slipping free of the cuffs, Leshore fled the scene. He was apprehended minutes later.

. . . In a two to one decision, the Court of Appeals reversed the trial court finding the evidence was insufficient to support the conviction. Leshore v. State, 739 N.E.2d 1075,

1079 (Ind. Ct. App. 2000). Observing that escape requires a person to flee from lawful detention, the Court of Appeals majority determined that Leshore was never lawfully detained because the Writ of Body Attachment was invalid on its face. [Citation omitted.] More specifically, the Court of Appeals pointed out that the statute concerning the issuance of a Writ of Body Attachment requires the trial court to “fix an amount of [] escrow, if the order that the person has allegedly violated concerns a child support obligation[;]” or “fix an amount of [] bail, if the order the person has allegedly violated does not concern a child support obligation[.]” Id. at 1077; Ind. Code § 34-47-4-2(b)(2). In this case, the form order for the Writ shows the trial court neither fixed an amount for escrow nor bail but specifically called for “No Bond.” [Citation to Record omitted.] . . .

. . . We first observe because the Writ did not include an amount for bail or escrow it was defective. However, we disagree with the Court of Appeals that the defect rendered the Writ invalid on its face. . . .

[A]lthough not facially invalid, the Writ was defective as a matter of law. . . . Citing Indiana Code sections 35-41-1-18(a)(1) and (10) (Supp. 2000), which defines lawful detention as “arrest [] or [] any other detention for law enforcement purposes,” Judge Barnes writing in dissent concluded that Officer Bennington was engaged in a law enforcement activity, and thus Leshore was lawfully detained. [Citation omitted.] We agree with Judge Barnes. . . .

. . . .
SHEPHARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

OSBORNE v. STATE, No. 34S00-0009-CR-531, ___ N.E.2d ___ (Ind. Sept. 13, 2001).
RUCKER, J.

Defense counsel requested, and the trial court ordered, a separation of witnesses pursuant to Indiana Evidence Rule 615, which provides:

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause.

After the trial court ordered the separation of witnesses, the prosecutor requested to keep two police officers at counsel table during trial—presumably one as an officer of the State under clause (2) and the other as a person essential to the presentation of the State’s case under clause (3). The prosecutor gave the following reasoning: “[T]he complex nature of this case and the fact that these officers supervised the investigation on different shifts and therefore had responsibilities for different parts of the investigation would require that I have them both in the courtroom with me.” [Citation to Record omitted.] . . .

Although the majority view on this issue is reflected in Justice Boehm’s concurring opinion, we recently explained that the basic premise of Rule 615 is that, upon request of any party, witnesses should be insulated from the testimony of other witnesses. [Citation omitted.] Therefore, Rule 615’s exemptions “should be narrowly construed and cautiously granted.” [Citation omitted.] . . .

. . . [O]ur own review of the record does not show an abuse of discretion. Osborne has failed to meet his burden of showing that the trial court abused its discretion in permitting the two police officers to remain in the courtroom throughout the trial.

. . . .

SULLIVAN, J., concurred [as to the Evid. R. 615 issue].

BOEHM, J., filed a separate written opinion in which he concurred in the result [as to the Evid. R. 615 issue], and in which SHEPARD, C. J. and DICKSON, J., joined, in part as follows:

I believe that the trial court should not have allowed two police officers to remain in the courtroom after granting a separation of witnesses order pursuant to Indiana Rule of Evidence 615. I also believe that the burden of showing harmless error falls on the State, but because that burden is satisfied in this case, I concur in result in Part III.

. . . .

In this case, the State asked that two police officers remain at the prosecutor’s table throughout the trial without reference to any of the Rule 615 exemptions. The purpose of

the party representative exemption is to humanize those parties who are not natural persons. It allows only one representative. [Citation omitted.] One or more witnesses may be permitted under the third exemption in Rule 615 for persons “essential to the presentation of the party’s case.” To be present under this provision the trial court must be persuaded that the “witness has such specialized expertise or intimate knowledge of the facts of the case that a party’s attorney could not effectively function without the presence and aid of the witness.” [Citation omitted.] As the Court points out, Rule 615’s exemptions “should be narrowly construed and cautiously granted.” [Citation omitted.] Accordingly, if an “essential witness” is an employee of the institutional party, there is no reason to permit an additional investigative witness as a representative of the party to avoid the problem of a human being versus an empty chair. Therefore, if two are needed, both must be qualified as essential.

....

In this case, the prosecutor contended that the two officers were “essential” because “the complex nature of this case and the fact that these officers supervised the investigation on different shifts and therefore had responsibilities for different parts of the investigation would require that I have them both in the courtroom with me.” Osborne, however, was apprehended immediately after the crime took place, was arrested two days later, and gave two confessions to police, both of which were admitted at trial. Unlike Long, this case did not involve complicated facts, a plethora of witnesses, or an extensive investigation. There is no showing that the presence of any witness was essential.

... The opinion of the Court concludes that Osborne has failed to meet his burden of showing that the trial court abused its discretion. But as I observed in dissent in Hernandez v. State, it is often difficult or impossible to assess the effect on the testimony of a witness of having heard the testimony of others. 716 N.E.2d at 954-55. For that reason, I would follow the federal circuits that require the party supporting the erroneous decision to show that the error was harmless. I think that Osborne is entitled to a presumption of prejudice that the State must overcome to prevail. [Citation omitted.]

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PARKER v. STATE, No. 10A01-0010-CR-344, ___ N.E.2d ___ (Ind. Ct. App. Aug. 31, 2001).
MATTINGLY-MAY, J.

Parker challenges the constitutionality of Ind. Code § 35-50-2-11(b)(1), asserting the sentence enhancement based on his use of a handgun in the commission of the robbery denied him due process. We address only his federal argument, as Parker relies on recent United States Supreme Court authority on this issue and makes no independent argument under the Indiana Constitution.

Ind. Code § 35-50-2-11 provides:

(c) The state may seek, on a page separate from the rest of a charging

instrument, to have a person who allegedly committed an offense sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense.

(d) If after a sentencing hearing a court finds that a person who committed an offense used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of five (5) years.

... Parker correctly notes that “other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* [footnote

omitted] must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis supplied). [Citation omitted.] . . .

The application of the Indiana statute under which Parker’s sentence was enhanced did not offend due process under the *Jones* and *Apprendi* standard. Parker appears to argue the application of the statute is unconstitutional because the trial court, and not the jury, determined Parker used a handgun. He is incorrect. We note initially that Parker’s charging information explicitly stated that Parker committed the robbery “while armed with a handgun.” [Citation to Record omitted.] The charging information was included in the jury instructions. The jury was given alternative theories upon which to convict Parker of the Class A felony: serious bodily injury to Loren Johnson, the use of or threat of use of force during the course of the robbery, or the use of a handgun itself. The jury’s verdict did not reveal upon what theory it found Parker guilty of the Class A felony. However, all of these bases for the Class A felony conviction arose out of the use of a gun during the course of the robbery;⁸ as such, the jury must have found beyond a reasonable doubt that a gun was used.

Parker is correct that under *Jones* [*v. United States*, 526 U.S. 227 (2000)] and *Apprendi*, a fact that increases the penalty for a crime beyond the prescribed statutory maximum must normally be submitted to a jury and proved beyond a reasonable doubt. The charge that Parker used a handgun during the robbery was submitted to the jury, and to reach its verdict the jury must have determined beyond a reasonable doubt that the State proved he did.⁹ The enhancement of Parker’s sentence was therefore not error.

....

⁸Counsel for Parker does not raise the issue as to whether the separate sentence enhancement determined by the trial court during sentencing presents a “double enhancement” issue. Accordingly, we do not address it.

⁹ We express no opinion as to whether, under *Jones* and *Apprendi*, the application of the handgun enhancement would violate due process if it were not so clear that the jury had found Parker used a handgun. SHARPNACK, C. J., and KIRSCH, J., concurred.

STEWART v. STATE, No. 02A03-0103-CR-89, ___ N.E.2d ___ (Ind. Ct. App. Aug. 31, 2001).
NAJAM, J.

The question Stewart presents is one of first impression: whether trial courts are required to articulate aggravating and mitigating factors in sentencing those persons convicted of a misdemeanor. In felony cases, when a trial court relies on aggravating or mitigating circumstances to deviate from a presumptive sentence, the court is required to identify all significant mitigating and aggravating circumstances; state the specific reason why each circumstance is considered to be mitigating or aggravating; and articulate its evaluation and balancing of the circumstances when determining if the mitigating circumstances offset the aggravating ones. [Citations omitted.] Felony statutes contain a

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presumptive sentence that may be enhanced or reduced. Misdemeanor statutes, however, do not establish a presumptive sentence but only state the maximum allowable sentence. Without a presumptive sentence from which to start, trial courts have nothing to enhance or reduce. . . .

....

The statute requires our courts to articulate aggravating and mitigating circumstances only in felonies. The statute excludes misdemeanor sentencing by implication. [Citation omitted.] The legislature’s decision to omit presumptive sentences from misdemeanor statutes reflects a realistic appraisal of this state’s judicial resources. Our high-volume misdemeanor courts would be overburdened if trial judges were required to articulate and

balance aggravating and mitigating circumstances before imposing sentence on a misdemeanor conviction.

....
SHARPNACK, C. J., and RILEY, J., concurred.

STATE v. McGUIRE, No. 21A04-0101-CR-2, ___ N.E.2d ___ (Ind. Ct. App. Sept. 5, 2001).
DARDEN, J.

When a defendant seeks or acquiesces in a delay, the time limitations set by Crim.R. 4 are extended by the length of the delay. [Citation omitted.] Moreover, "[w]hen a defendant requests an indefinite continuance and later becomes dissatisfied that his trial has not been reset, he must take some affirmative action to notify the court that he now desires to go to trial to reinstate the running of the time period." Wheeler v. State, 662 N.E.2d [192] at 194 [(Ind. Ct. App. 1996)]. Absent the notification, the subsequent delay is attributable to the defendant. Id.

Although not listed on the CCS, [footnote omitted] McGuire acknowledges and the record reveals that on April 1, 1999 he filed a motion to "reschedule" the April 19, 1999 jury trial. His motion requested an indefinite delay in the trial date while the parties engaged in plea negotiations. . . .

Neither the CCS nor the record of proceedings reveals any request for a trial setting by McGuire. Pursuant to Vermillion and Wheeler, once the defendant has requested an indefinite delay he must take some affirmative action to notify the trial court that he is dissatisfied with the delay and desires to go to trial in order to recommence the running of the Crim.R. 4(C) period. Because McGuire never did take any affirmative action to express dissatisfaction with his previous request for the delay and that he desired to go to trial, the entire time period after the indefinite continuance request was granted is attributable to McGuire.

....
BARNES and NAJAM, JJ., concurred.

CIVIL LAW ISSUES

ASHABRANER v. BOWERS, No. 49S02-0010-CV-603, ___ N.E.2d ___ (Ind. Aug. 30, 2001).
SULLIVAN, J.

Plaintiff Madonna Ashabraner sued defendant Gary Bowers and his employer, Rumpke of Indiana-Shelbyville, Inc., after a collision between her car and their garbage truck. Ashabraner appeals a jury verdict in favor of Bowers and Rumpke on grounds that the trial court violated Batson v. Kentucky by allowing Bowers and Rumpke to remove an African-American woman from the jury pool without requiring any race neutral justification in the face of a prima facie case of discrimination. We agree and reverse the judgment of the trial court.

....
[T]he party objecting to the peremptory challenge must set out a prima facie case of discrimination. To meet this requirement, the party contesting the challenge must show that:

(1) the juror is a member of a cognizable racial group; (2) [the challenging party] has exercised peremptory challenges to remove that group's members from the jury; and (3) the facts and circumstances of this case raise an inference that the exclusion was based on race. [Citation omitted.]

[Citation omitted.] If the moving party makes out a prima facie case, the burden shifts to the challenging party to "come forward with a neutral explanation for [the challenge]." [Citation

omitted.] [Footnote omitted.] The party's "explanation need not rise to the level justifying exercise of a challenge for cause." [Citation omitted.] Instead, "[i]f the explanation, on its face, is based on something other than race, the explanation will be deemed race neutral." [Citation omitted.] [Footnote omitted.]

... To make out a prima facie case of racial discrimination, Ashabraner told the trial court that:

[The juror] was an African American. [D]uring the course of the voir dire, [she] gave what appeared to be the most neutral possible answers.[Footnote omitted.] She appeared to be intelligent. She appeared to be attentive and she answered all the questions that were posed to her by [] counsel. The only reason that he could have used the peremptory challenge is basically because of this person's race.

[Citation to Record omitted.] In her motion to correct errors and on appeal, Ashabraner noted that the juror was the only member of the venire who was black.⁷ Bowers's counsel argued in reply that

I did not strike [the juror] because of race. I struck [the juror] because of the way I saw the jury panel being made up. And ... this is a situation where [the juror] may be African American. ... I don't [see] race as being an issue one way or another in this case. And ... it didn't play into the decision in ... any way. There wasn't a single panel member, Your Honor, who didn't give positive responses to both sides on all questions. ... [R]ace didn't enter into it and ... how do you defend this. How do you defend this argument? ... [A]ll I can say is ... there was nothing inappropriate with using that peremptory strike in this case.

[Citation to Record omitted.] The trial court overruled Ashabraner's objection by stating: "I think the case puts the Court in an untenable position and peremptory challenges can be utilized for any reason." [Citation to Record omitted.]

... [T]he trial court refused to analyze Ashabraner's objection to the peremptory challenge, indicating that the court did not follow Batson even though it applies to civil cases. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991). ... Because Batson applies to civil cases, the trial court was clearly wrong to conclude that "peremptory challenges can be utilized for any reason." [Citation to Record omitted.]

....
The Court of Appeals did not rely on the misunderstandings of the trial court, but applied Batson and concluded that the circumstances surrounding the peremptory challenge did not demonstrate a prima facie case of discrimination. We hold that this conclusion was error.

... The record shows that Bowers removed the only black member of the venire. We have held that this fact alone establishes a prima facie case, see McCants v. State, 686 N.E.2d 1281, 1284 (Ind. 1997), and, at a minimum, it is evidence of discrimination that must weigh in the balance.

... The trial court and the Court of Appeals did not reach the issue of whether Bowers could offer a race neutral explanation. Because the trial court applied the wrong standard and the Court of Appeals held that Ashabraner had not made out a prima facie case, we reverse and remand for a new trial. [Footnote omitted].

....

⁷Bowers argues on appeal that we should not consider the fact that the juror was the only black member of the venire because Ashabraner did not mention this fact before the trial court. (Appellee's Br. at 8 n.2.) The Court of Appeals accepted this argument and refused to consider the juror's status as the only black member of the venire. See Memorandum Opinion at 4 n.2. However, Bowers made frequent mention of this fact in his response to Ashabraner's motion to correct errors (R. at 48-51) and in his appellate brief. See Appellee's Br. at 7. We conclude that Bowers has conceded that the juror was the only black member of the

venire. Indeed, while Bowers asks us to ignore facts that Ashabraner did not mention during argument before the trial court, he asserts a race neutral reason for the challenge that he did not raise until his response to Ashabraner's motion to correct errors. See Appellee's Br. at 10 ("What was not said at trial, for strategically obvious reasons, but was stated in [Bowers's] Response in Opposition to Plaintiff's Motion to Correct Errors ... was that the person seated in the 14th seat was a third year law student who could be valuable to [Bowers] in addressing proximate cause issues")

BOEHM and RUCKER, JJ., concurred.

DICKSON, J., filed a separate written opinion in which he dissented, and in which SHEPARD, C. J., concurred, in part, as follows:

The majority reverses on grounds that the trial court found no prima facie case of discriminatory intent and failed to require the party exercising the peremptory challenge to present a race neutral justification. I believe that the rationale and holding of the majority are contrary to United States Supreme Court authority [Citations omitted.]

Under the facts of this case, inquiry into whether the plaintiff established a prima facie case is moot. . . . [I]f the proponent of the challenge, without waiting for a ruling by the court, volunteers an explanation, and the trial court rules on the issue of discriminatory intent, then the "preliminary issue of whether [a party] had made a prima facie showing becomes moot." [Citations omitted.] . . . The fact that the defense interjected its reason for exercising the peremptory challenge undermines the majority's conclusion that the trial court failed to require one.

When the party exercising the peremptory challenge presents a purported race-neutral explanation, the only requirement is that the explanation be neutral; it need not be "persuasive, or even plausible." [Citation omitted.] . . .

In addition to denying any discriminatory intent, the attorney for the defendants stated:

I went through the panel. I decided who I thought plaintiff would strike, and I saw her [sic] was left and I saw-uh-went through who I had available to me, and Ms. Brown was the last one-uh-before Mr. Watts that-uh-that I can to to [sic] make up the panel that I though would be the best for my situation and my client in this case.

[Citation to Record omitted.] Defense counsel's expressed reason for the peremptory challenge was strategic. [Footnote omitted.] For purposes of step two of the analysis, there is no inherent discriminatory intent in the explanation provided by the defendants, and as stressed in Purkett, the credibility or persuasiveness of the explanation is not in issue. [Citation omitted.]

In response to the defendants' proffer of a race-neutral explanation and in support of her objection to the defendants' peremptory challenge, the plaintiff argued to the trial court that the challenged juror was an African-American and that, because the juror's demeanor and answers were "neutral," [footnote omitted] the "only reason" the defendants "could have used the peremptory challenge is basically because of this person's race." [Citation to

Record omitted.]

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With the presentation of defendants' explanation for their peremptory challenge and the plaintiff's responding argument, the issue thereby proceeded to step three, in which the trial court must determine whether the party objecting to the peremptory challenge has carried the burden of proving purposeful discrimination. Credibility and persuasiveness of the explanation are appropriate considerations in step three. After plaintiff's argument, the trial court ruled: "I think the case puts the court in an untenable position and peremptory challenges can be utilized for any reason. I'll show the motion denied." [Citation to Record omitted.]³

....

If the trial court had sustained the plaintiff's objection to the defendants' peremptory challenge by finding that the plaintiff had proven purposeful racial discrimination, such a determination, deferentially reviewed, would require affirmance. Likewise, here, where the trial court heard argument of both counsel and was in a unique position to assess the totality of circumstances and then denied the objection and permitted the peremptory challenge, we should accord great deference to the judge's decision, as required by the decisions of this Court and the United States Supreme Court. I believe that the trial court should be affirmed.

³ The majority infers that the trial court refused to apply Batson principles because this was a civil case. I disagree and read the trial court's comment merely to reflect its view that the plaintiff was presenting only minimal circumstances to support her objection and further to express the court's awareness of the important role of peremptory challenges. It should also be noted that, at the close of trial, the plaintiff filed a motion to correct errors that included a claim that the trial court erred in allowing the defendants to exercise the peremptory challenge over objection without offering a race-neutral explanation other than "strategy." Record at 25. Both plaintiff and defendants submitted memoranda in support of their respective positions. The plaintiff pointed out in her memorandum, Record at 31-32, and the defendants do not dispute, that a Batson challenge may be made in a civil case. The defendants admitted in their memorandum that the plaintiff made a "timely Batson objection" Record at 53. While the basis of the trial court's ruling during trial voir dire may be somewhat imprecise, its later ruling denying the motion to correct error follows the parties' agreement that a Batson objection does apply to peremptory challenges in civil cases, thus indicating that the trial court did not misunderstand the application of Batson to civil trials.

BUCKALEW v. BUCKALEW, No. 34S05-0107-CV-332, ___ N.E.2d ___ (Ind. Sept. 7, 2001).
DICKSON, J.

Concluding that a local court rule requiring the filing of an income and property disclosure form was jurisdictional, the Court of Appeals held a dissolution decree was void due to the trial court's failure to follow its own rule. Buckalew v. Buckalew, 744 N.E.2d 504 (Ind. Ct. App. 2001). Having previously granted transfer, we hold that the local rule was not jurisdictional, and we reject the claim that noncompliance with the local rule requires the dissolution decree to be vacated.

The parties do not dispute that at all times relevant to this case, Howard County Local Civil Rule 16(B) required each party to a dissolution action to file a specified financial disclosure form with the court. . . . The proceedings that resulted in a dissolution of the ten-year marriage of Tim and Kim Buckalew did not include the disclosure form required by Rule 16(B), and neither Kim nor Tim were represented by counsel of record in the dissolution. The issue of the missing disclosure form was first raised seven months after the dissolution when Kim sought relief from judgment pursuant to Indiana Trial Rule 60(B) alleging several grounds, one of which asserted that Tim "failed to file a property disclosure as required by local rules." [Citation to Record omitted.] . . .

. . . .
Local court rules for the regulation of practice within a local court are authorized by Indiana Trial Rule 81. In Meredith v. State, 679 N.E.2d 1309 (Ind. 1997), this Court permitted a trial court to waive compliance with its own local court rule. We explained:

Before a court may set aside its own rule, and it should not be set aside lightly, the court must assure itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule.

[Citation omitted.] The inclusion of this "not a mandatory rule" qualification was a reference to time limitations and other procedural prerequisites that had generally been described as "jurisdictional," and from which courts may not waive compliance. [Citation omitted.] In the present case, Kim urges that Howard County Local Civil Rule 16(B)(4) was such a jurisdictional or mandatory rule.

We observe that the term "jurisdictional" is not helpful in resolving the present issue. "To render a valid judgment, a court must possess two forms of jurisdiction: jurisdiction over

the subject matter and jurisdiction over the parties." [Citation omitted.] There is no claim that the trial court here lacked either jurisdiction over the parties or subject matter jurisdiction, i.e., the general scope of authority to hear and determine dissolution cases. [Citation omitted.] Once a court has acquired subject matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the *exercise* of jurisdiction rather than to the *existence* of jurisdiction. [Citation omitted.] . . .

Howard County Local Civil Rule 16(B)(4), as authorized by T.R. 81 to regulate practice in the local court, is a rule to facilitate discovery and to promote the disclosure of relevant information. It does not restrain the court's subject matter jurisdiction, its jurisdiction over the parties, or its jurisdiction over the particular case. To the extent that the local rule appears to employ mandatory language, the local court must follow its own rule. [Citation omitted.] Upon a failure to do so, however, the court's subsequent action is not void. Rather, as with other trial errors, the error may be presented upon appeal if a specific and timely objection was made.

In the present case, the dissolution trial court record included an express written "Waiver of Domestic Relations Disclosure Form" signed by each of the parties, and examined and approved by the trial judge. There was no specific and timely objection to the court's entry of a dissolution decree notwithstanding the absence of a disclosure form filed pursuant to the local rule. Nor was there a timely objection to the court's acceptance of the parties' written waiver contrary to the provision in the local rule requiring that both parties be represented by counsel as a precondition to waiver. We therefore reject the appellate claim that noncompliance with Howard County Local Civil Rule 16(B)(4) requires the dissolution decree to be vacated.

. . . .
SHEPARD, C. J., and BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

CARMICHAEL v. SIEGEL, No. 29A02-0011-CV-740, ___ N.E.2d ___ (Ind. Ct. App. Aug. 31, 2001).

BARNES, J.

Mother vigorously argues that the trial court erred when it imputed annual income to her of \$20,440, based on an annual rate of return of seven percent on IRAs valued in May 2000 at \$584,000, and after assuming taxation and penalties equaling fifty percent of any withdrawal she would make from these accounts. . . .

. . . .
The question of whether and to what extent the annual return on a specified retirement account may be included in a parent's income for purposes of calculating his or her child support obligation appears to be one of first impression in Indiana. This is a question of law that we will review de novo. We appreciate the trial court's attempt to resolve this issue and acknowledge that some jurisdictions have concluded that IRA "earnings" may be counted as income for child support purposes. See Dunn v. Dunn, 952 P.2d 268, 272

(Alaska 1998); Tessmer v. Tessmer, 903 P.2d 1194, 1196 (Colo. Ct. App. 1995). [Footnote omitted.] However, at least one court has held that IRA "earnings" are not properly included in the determination of a parent's gross income, at least where no withdrawals have been made from the account since its inception, because such earnings are not available to the parent. Bullock v. Bullock, 719 So.2d 113, 117 (La. Ct. App. 1998). We agree with this view. . . . The reasoning of the Alaska and Colorado courts was essentially that because "interest" and "dividends" are expressly listed as "income," as in our Guidelines, the source and nature of "interest" and "dividends" is of no consequence, even if they are associated with and automatically reinvested in a tax-deferred IRA and the parent does not currently receive or use the interest and dividends. [Footnote omitted.] [Citations omitted.] . . .

. . . We conclude that the phrase “actual income” as used in the Guidelines necessarily implies that the income be not only existing in fact but also currently received by the parent and available for his or her immediate use. This begs the question: are annual IRA returns currently received by a parent and available for his or her immediate use?

. . . There is no absolute prohibition against making early withdrawals from an IRA for those who wish to do so and pay the penalty; moreover, several exceptions to the ten percent penalty have arisen in recent years, including withdrawals for first-time home purchases, college expenses, and medical expenses. [Citation omitted.] However, we believe that where, as here, the annual returns of a parent’s IRA or IRAs are automatically reinvested and there is no indication that previous withdrawals from the IRA have been made to fund the parent’s lifestyle choices or living expenses, those returns generally should not be considered “actual income” when calculating the parent’s child support obligation. Such returns are not currently received by the parent nor immediately available for his or her use.

. . . .
DARDEN and NAJAM, JJ., concurred.

CASE CLIPS TRANSFER TABLE

September 21, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|---|-------------------------------------|---|---------------------|---|
| <i>Owens Corning Fiberglass v. Cobb</i> | 714 N.E.2d 295 49A04-9801-CV-46 | Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos | 1-19-00 | 9-10-01. 49S04-0004-CV-00035. There was enough evidence of exposure to send case to jury. Trial court erred in excluding evidence a "nonparty" may have been at fault. |
| <i>Felsher v. City of Evansville</i> | 727 N.E.2d 783 82A04-9910-CV-455 | University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad.. | 8-15-00 | |
| <i>Dow Chemical v. Ebling</i> | 723 N.E.2d 881 22A05-9812-CV-625 | State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment. | 8-15-00 | 8-23-01. 763 N.E.2d 653. No. 22S05-0008-CV-481. Federal law does not preempt claim against pesticide applicator. |
| <i>South Gibson School Board v. Sollman</i> | 728 N.E.2d 909 26A01-9906-CV-222 | Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester | 9-14-00 | |
| <i>Moberly v. Day</i> | 730 N.E.2d 768 07A01-9906-CV-216 | Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine. | 10-24-00 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|---|--------------------------------------|--|---------------------|--|
| <i>Shambaugh and Koorsen v. Carlisle</i> | 730 N.E.2d 796 02A03-9908-CV-325 | Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur. | | |
| <i>S.T. v. State</i> | 733 N.E.2d 937 20A03-9912-JV-480 | No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion | 10-24-00 | |
| <i>Tapia v. State</i> | 734 N.E.2d 307 45A03-9908-PC-304 | Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice | 11-17-00 | 8-20-01. 753 N.E.2d 581. No. 45S03-0011-PC-708. Ct. of Appeals Opinion wrongly holds withdrawal with prejudice is <u>required</u> unless state shows prejudice. |
| <i>Tincher v. Davidson</i> | 731 N.E.2d 485 49A05-9912-CV-534 | Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly | 11-22-00 | |
| <i>Brown v. Branch</i> | 733 N.E.2d 17 07A04-9907-CV-339 | Oral promise to give house to girlfriend if she moved back not within the statute of frauds. | 11-22-00 | |
| <i>New Castle Lodge v. St. Board of Tx. Comm.</i> | 733 N.E.2d 36 49T10-9701-TA-113 | Fraternal organization which owned lodge building was entitled to partial property tax exemption | 11-22-00 | |
| <i>Reeder v. State</i> | 732 N.E.2d 1246 49A05-9909-CV-416 | When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted. | 1-11-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|--|--------------------------------------|---|---------------------|---|
| <i>Holley v. Childress</i> | 730 N.E.2d 743 67A05-9905-JV-321 | Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error. | 1-11-01 | |
| <i>Cannon v. Cannon</i> | 729 N.E.2d 1043 49A05-9908-CV-366 | Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales | 1-11-01 | |
| <i>Davidson v. State</i> | 735 N.E.2d 325 22A01-0004-PC-116 | Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences. | 1-17-01 | |
| <i>Leshore v. State</i> | 739 N.E.2d 1075 02A03-0007-CR-234 | (1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape. | 1-29-01 | 9-13-01. 02D04-9903-CF-133. Person restrained in cuffs under body attachment is "lawfully detained" under escape statute, even if writ later found defective. |
| <i>Mercantile Nat'l Bank v. First Builders</i> | 732 N.E.2d 1287 45A03-9904-CV-132 | materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure | 2-9-01 | |
| <i>State Farm Fire & Casualty v. T.B.</i> | 728 N.E.2d 919 53A01-9908-CV-266 | (1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to \$300,000 plus post-judgment interest on entire amount of judgment until payment of its limits. | 2-9-01 | |
| <i>Merritt v. Evansville Vanderburgh School Corp</i> | 735 N.E.2d 269 82A01-912-CV-421 | error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive | 2-9-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|--------------------------------------|--|---|---------------------|---|
| <i>IDEM v. RLG, Inc</i> | 735 N.E.2d 290 27A02-9909-CV-646 | the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title. | 2-9-01 | |
| <i>State v. Gerschoffer</i> | 738 N.E.2d 713 72A05-0003-CR0116 | Sobriety checkpoint searches are prohibited by Indiana Constitution. | 2-14-01 | |
| <i>Healthscript, Inc. v. State</i> | 724 N.E.2d 265, <i>rhrg.</i> 740 N.E.2d 562 49A05- 9908-CR-370 | Medicare fraud crimes do not include violations of state administrative regulations. | 2-14-01 | |
| <i>Vadas v. Vadas</i> | 728 N.E.2d 250 45A04-9901-CV-18 | Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate. | 3-1-01 | |
| <i>N.D.F. v. State</i> | 735 N.E.2d 321 No. 49A02-0003-JV-164 | Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error | 3-2-01 | |
| <i>Robertson v. State</i> | 740 N.E.2d 574 49A02-0006-CR-383 | Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute. | 3-9-01 | |
| <i>Bradley v. City of New Castle</i> | 730 N.E.2d 771 33A01-9807-CV-281 | Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement. | 4-6-01 | |
| <i>King v. Northeast Security</i> | 732 N.E.2d 824 49A02-9907-CV-498 | School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale. | 4-6-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|--|---|---|---------------------|--|
| <i>State v. Hammond</i> | 737 N.E.2d 425 41A04-0003-PC-126 | Amendment of driving while suspended statute to require “validly” suspended license is properly applied to offense committed prior to amendment, which made “ameliorative” change to substantive crime intended to avoid supreme court’s construction of statute as in effect of time of offense. | 4-6-01 | |
| <i>Dewitt v. State</i> | 739 N.E.2d 189 | Trial court’s failure to advise a defendant of his <i>Boykin</i> rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea | 4-26-01 5-10-01 | 45S04-0104-PC-221. Record indicates proper advice and knowing plea. |
| <i>Buchanan v. State</i> | 742 N.E.2d 1018 18A04-0004-CR-167 | Admission of pornographic material picturing children taken from child-molesting defendant’s home was error under Ev. Rule 404(b). | | |
| <i>McCary v. State</i> | 739 N.E.2d 193 49A02-0004-PC-226 | Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under <i>Woods v. State</i> holding handed down after direct appeal.. | 5-10-01 | |
| <i>Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.</i> | 732 N.E.2d 215 No. 29A02-9909-CV-661 | Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission’s prior approvals of numerous subdivision having same defect. | 5-10-01 | |
| | | | | |
| <i>Martin v. State</i> | 744 N.E.2d 574 No 45A05-0009-PC-379 | Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability. | 6-14-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|--|---|--|---------------------|---|
| <i>Catt v. Board of Comm'rs of Knox County</i> | 736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV- 396 | County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity. | 6-14-01 | |
| <i>Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.</i> | 741 N.E.2d 361 No. 50A03-9912-CV- 476 | (1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred. | 6-14-01 | |
| <i>In re Ordinance No. X- 03-96</i> | 744 N.E.2d 996 02A05-0002-CV-77 | Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation. | 7-18-01 | |
| <i>Corr v. Schultz</i> | 743 N.E.2d 1194 71A03-0006-CV-216 | Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, <i>Sanders</i> , 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, <i>Corr v. American Family Insurance</i> , used <i>Sanders</i> to hold that the correct analysis was to "compare the \$600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the \$600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported <i>Corr</i> case. | 7-18-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|---|--|---|---------------------|---|
| <i>Buckalew v. Buckalew</i> | 744 N.E.2d 504 34A05-0004-CV-174 | Interprets local rule "no final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed [financial] disclosure form is filed" to be "jurisdictional" so that trial court which made the rule had no authority to conduct a hearing or enter a decree without the required disclosure forms or a waiver by both parties. | 7-18-01 | 9-07-01. 34S05-0107-CV-332. Local Rule not "jurisdictional" nor did non-compliance require vacating divorce decree. |
| <i>Friedline v. Shelby Insurance Co.</i> | 739 N.E.2d 178 71A03-0004-CV-132 | Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith. | 7-18-01 | |
| <i>St. Vincent Hospital v. Steele</i> | 742 N.E.2d 1029 34A02-0005-CV-294 | IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute. | 7-18-01 | |
| <i>Smith v. State</i> | 748 N.E.2d 895 29A02-00100PC-640 | Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent. | 7-19-01 | |
| <i>Martin v. State</i> | 748 N.E.2d 428 03A01-0012-PC-412 | Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing <i>Dishroon v. State</i> noting 2001 amendment providing for such credit is inapplicable. | 8-10-01 | |
| <i>State Bd. of Tax Comm'rs v. Garcia</i> | 743 N.E.2d 817 (Tax Ct. 2001) 71T10-9809-TA-104 | Calculation by which Grade A-6 assessment was reached was not supported by regulations and hence was arbitrary and capricious. Swimming pool assessment as "A" rather than "G" was likewise outside regulations and reversed. | 8-13-01 | |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|-------------------------|--|---|------------------|---|
| <i>Dunson v. Dunson</i> | 744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375 | Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance. | 8-13-01 | |
| <i>State v. Fulkrod</i> | 735 N.E.2d 851 48A02-003-CR-176 | Sentence modification after 5 years over prosecutor's objection was not authorized. <i>Pannarale v. State</i> , 638 N.E.2d 1247 (Ind. 1994) is inapposite, as the statute on which it was based was repealed in 1999, so that under modification statute 35-38-1-17 prosecutor's agreement was required. | 8-23-01 | 753 N.E.2d 630. 48A02-0003-CR-176. Under <i>Pannarale v. State</i> , 638 N.E.2d 1247 (Ind. 1994) a judge may modify a plea bargained sentence within plea bargain parameters only when modification is permissible " <u>pursuant to the statute</u> " (emphasis in opinion); as present statute requires prosecutor's agreement, modification was unauthorized in this case. |
| <i>D'Paffo v. State</i> | 749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442 | Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613. | 8-24-01 | |
| <i>Griffin v. State</i> | 735 N.E.2d 258 49A02-9909-CR-647 | Alternate's participation in deliberations not "outside influence" admissible under Ev. Rule 606(3) to challenge verdict. | 9-7-01 | 49S02-0101-CR-43. In evaluating effect of alternate's behavior on deliberations under Ev. Rule 606, juror affidavits that it "affected" them may not be considered; focus must be on alternate's behavior and its likely effect on jury. When defense requested immunity and permission to question defendant's boyfriend as hostile witness, and had boyfriend's former attorney "waiting in the wings" to testify he confessed after boyfriend's expected denial, attorney's testimony properly rejected over hearsay objection – sole purpose of defense was "to present otherwise inadmissible evidence cloaked as impeachment." |

| Case Name | N.E.2d citation, Ct. Appeals No. | Court of Appeals Holding Vacated by Transfer Grant | Transfer Granted | Supreme Court Opinion After Transfer |
|--|-------------------------------------|--|---------------------|---|
| <i>Farley Neighborhood Association v. Town of Speedway</i> | 09-07-01 49S02-0101-CR-43 | Continuation of 45-year-old 50% surcharge on sewage service to customers outside municipality was arbitrary, irrational, and discriminatory.. | 9-20-01 | |
| <i>Neher v. Hobbs</i> | 752 N.E.2d 48 92A04-0008-CV-316 | Trial judge erred in requiring new trial when jury found defendant negligent but awarded \$ 0 damages, as jury clearly found injury was preexisting. | 9-6-01 | |
| <i>Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne</i> | 747 N.E.2d 648 02A04-0005-CV-219 | Restaurant was subject to exception to City's anti-smoking ordinance. | 9-20-01 | |
| <i>Hall Drive Ins, Triangle Park v. City of Fort Wayne</i> | 747 N.E.2d 643 02A03-0005-CV-189 | Companion case to <i>Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne</i> , above | 9-20-01 | |

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 Jane Seigel, Executive Director
 Michael J. McMahon, Director of Research
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